

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

KAREN MORTON,)	
)	
Employee/Grievant,)	DOCKET No. 13-12-598
v.)	
)	DECISION AND ORDER
DEPARTMENT OF TREASURY,)	
)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on August 27, 2014 in the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Paul R. Houck, and Jacqueline Jenkins, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Roy S. Shiels, Esquire
on behalf of employee/grievant
Karen Morton

Kevin Slattery
Deputy Attorney General
on behalf of the Department of
Treasury

BRIEF SUMMARY OF THE EVIDENCE

The Department of Treasury (“Treasury”) offered, and the Board admitted into evidence ten documents marked for identification as Exhibits A-J. Treasury called no witnesses.

The employee/grievant, Karen Morton (“Morton”), offered, and the Board admitted into evidence sixteen documents marked for identification as Exhibits 1 - 16. Morton called one witness, Zafar Chaudhry, and testified on her own behalf.

Prior to the hearing, Treasury renewed an objection to admit Morton’s Exhibit 1 due to the full string of the email not being available. Counsel for Morton argued that one page containing two emails was all that was in Morton’s possession. The Board granted Treasury’s motion as the portion of email Morton wished to admit as evidence was submitted into evidence in one of Treasury’s exhibits.

Upon the close of the Grievant’s case, Treasury moved for an involuntary dismissal of the grievance, asserting Morton had failed to meet her burden to provide sufficient evidence to establish that a violation of Merit Rule 3.2 had occurred. The Board deliberated and granted Treasury’s motion for dismissal.

FINDINGS OF FACT

Morton has worked at Treasury since 2006 as the Assistant Cash and Debt Manager¹. As part of her duties, Morton assisted Zafar Chaudhry (“Chaudhry”), the Cash and Debt Manager², until he vacated his position on January 4, 2012. From January 4, 2012, until August 28, 2012, Morton assumed additional duties that had previously been performed by Chaudhry.

Treasury posted the vacancy for the Cash and Debt Manager position on March 19, 2012;

¹ The Assistant Cash and Debt Manager position is a pay grade 16.

² The Cash and Debt Manager position is a pay grade 20.

however, no interviews were conducted and the vacancy was not filled. The position was subsequently reclassified to Director of Finance and Investment Services on August 28, 2012, and Lou Vitola was hired into the new position.

In an email dated May 1, 2013, to the Treasurer and Deputy Treasurer, Morton requested her position be reclassified to Cash and Debt Manager. Morton asserted she was and had been performing the duties of the Cash and Debt Manager, in addition to those of her own position, since Chaudhry left.

Chaudhry testified he routinely performed 90 to 95 percent of the bond duties listed in the Grievant's November 26, 2012 request (Agency Exhibit C), including authorizing OMB to load authorized bond money into school districts budgets, sending out bond packages to school districts, reviewing the expenses incurred against bond projects, coordinating with bond counsel, reviewing financial statements, reviewing request for proposals ("RFPs") and using the Debt Manager software including all imports, additions, and deletions. Chaudhry cross-trained Morton on many of these duties, as she was his back-up should he not be available. While Chaudhry performed the bond duties the Grievant listed, he testified they only accounted for 20 to 30 percent of his responsibilities as Cash and Debt Manager.

The Assistant Cash and Debt Manager job description primarily includes bond work which is listed under specifications #1, #4, #5, #6, #7, #8, #10, and #11. Prior to leaving, Chaudhry trained Morton and another staff member to assume responsibility for debt work he had performed. Out of the eight specifications included in the job description for the Cash and Debt Manager position, Morton performs only #7: "Assists the State Treasurer and other bond issuing officers by responding to inquiries from bond rating services, commercial and investment banks regarding Delaware's financial operations and its economy."

On May 1, 2013, Treasury acknowledged receipt of Morton's request for reclassification

and forwarded it to the Office of Management and Budget. On June 20, 2013, Treasury notified Morton the supporting documentation she had provided was insufficient to support the conclusion that she was performing duties outside the scope of her job description.

The Board finds as a matter of fact that Morton, the Assistant Cash and Debt Manager at Treasury, took on additional duties previously performed by her supervisor Chaudhry, after he vacated his position of Cash and Debt Manager.

The Board finds as a matter of fact that Chaudhry routinely performed duties involving bonds even though bonds were a part of only one of his essential functions within his class specification.

The Board finds as a matter of fact that these duties involving bonds, performed by Chaudhry, were only 20 to 30 percent of his total job.

The Board finds as a matter of fact that the majority of the bond duties are found within the Assistant Cash and Debt Manager class specification.

The Board finds as a matter of fact that Morton performed only one of the eight essential functions of the Cash and Debt Manager job description.

CONCLUSIONS OF LAW

Merit Rule 3.2 provides:

Employees may be required to perform any of the duties described in the class specification, any other duties of a similar kind and difficulty, and any duties of a similar or lower class. Employees may be required to serve in a higher position, however if such service continues beyond 30 days, the Rules for promotion or temporary promotion apply, and they shall be compensated appropriately from the first day of service in the higher position.

Morton does not assert Treasury denied her specified due process rights.

In order to prevail in this matter, the Grievant must establish that she performs substantially the same duties as the higher classified position, i.e., Cash and Debt Manager. *Tucker v. Family Court*, MERB 10-10-486, Decision and Order (4/13/11)

The Board finds as a matter of law that Morton failed to meet her burden to establish that she was working above her class specification when she performed the bond duties previously performed by the Cash and Debt Manager.

It is uncontested that Morton assumed additional duties that had been performed by Chaudhry when he served as the Cash and Debt Manager. These duties, however, fall within the class specifications for the lower classified Assistant Cash and Debt Manager position. The class specifications for the Cash and Debt Manager include only one essential function involving bonds, which is the only essential function Morton performed after his departure.

While Chaudhry performed a significant amount of bond related duties on a regular basis, that is permitted under the Merit Rule 3.2. Development of uniform class specifications by OMB provides agencies latitude to assign job duties within the parameters of those specifications. No class specifications completely reflect the job duties of any particular position; the Board, however, must use the specification as the basis to determine whether an employee is working within his class.

The Board finds that Morton was not working outside of her class specification nor significantly performing the responsibilities of the Cash and Debt Manager, as she alleges, under Merit Rule 3.2.

ORDER

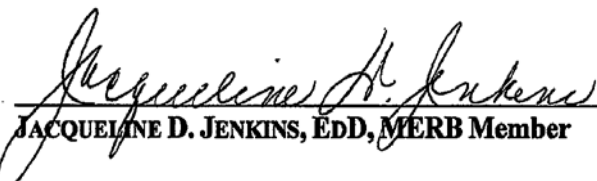
It is this **19th** day of **September**, 2014, by a unanimous vote of 4-0, the Decision and Order of the Board to dismiss Morton's appeal. The Board finds Morton was not working outside of her class specification nor significantly performing the responsibilities of the Cash and Debt Manager; consequently, there is no violation Merit Rule 3.2.



MARTHA K. AUSTIN, MERB Chairwoman



JOHN F. SCHMUTZ, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



PAUL R. HOUCK, MERB Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: September 19, 2014

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel
MERB website